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No. 93-

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

LEHIGH VALLEY HOSPITAL CENTER, et al.,
Petitioners,

v.

FRANK R. BOYER, M.D. AND NANCY H. BOYER, M.D.
BY FRANK R. BOYER as Administrator of Her Estate,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Health Care Quality Improvement Act of 1986's cost-shifting provision, 42, U.S.C. §11113, mandate that lower courts determine whether unsuccessful peer review plaintiffs' litigation conduct was frivolous, unreasonable, without foundation or in bad faith, even when plaintiffs were sanctioned earlier for discovery abuses under Fed. R. Civ. P. 37?

2. Did the court of appeals err in judicially amending the Health Care Quality Improvement Act of 1986 by exempting losing peer review plaintiffs from the Act's cost-shifting provision solely because plaintiffs were sanctioned earlier for discovery abuses under Fed. R.Civ. P.37?

3. Did the court of appeals abuse its discretion in affirming the district court's denial of peer review defendants' motion for attorney's fees and costs under the Health Care Quality Improvement Act of 1986's cost-shifting provision?

PARTIES TO THE PROCEEDING

This petition involves a decision by the United States Court of Appeals for the Third Circuit. Parties to *Boyer v. Lehigh Valley Hospital Center*, No. 92-1702 (3d Cir. July 12, 1993), on behalf of whom this Petition for Writ of Certiorari is submitted, were all appellants below.[1] Petitioners were defendants in the district court and unsuccessful appellants in the court of appeals.

Frank R. Boyer, M.D. and Nancy H. Boyer, M.D., by Frank R. Boyer as Administrator of her estate, the respondents, were plaintiffs in the district court and successful appellees in the court of appeals.

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1. Parties to this petition include the following peer review participants: Lehigh Valley Hospital Center, Inc., John A. Kibelstis, M.D., Donald J. Belmont, M.D., Michael H. Geller, M.D., Charles A. Gordon, M.D., Robert A. Morrow, M.D., Donald H. Gaylor, M.D., Bruce J. Silverberg, M.D., John J. Shane, M.D., Headley S. White, M.D., Alan J. Wolson, M.D., The Allentown Hospital, Inc., Darryl R. Lippmann, President, William W. Frailey, Jr., M.D., Dean F. Dimick, M.D., Richard Kisner, Janine Fiesta, Charles Scagliotti, M.D., Confidential Peer Review, Ltd., Ira Martin Grais, M.D., Michael Zeihen, M.D., Mitchell Ziarko, Jr., M.D., The Board of Directors of the Allentown Hospital, The Medical Board of the Allentown Hospital, The Board of Directors of the Lehigh Valley Hospital Center, and the Executive Commitee of the Medical Staff of the Lehigh Valley Hospital Center.

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REFERENCE TO UNOFFICIAL REPORTS OF OPINIONS

The court of appeals' unpublished memorandum opinion is captioned *Boyer v. Lehigh Valley Hospital Center,* No. 92-1702 (3d Cir. July 12, 1993). (A copy of the court of appeals' unpublished memorandum opinion is included in the attached Appendix beginning on A-3).

The district court's unpublished "Order" is captioned *Boyer v. Lehigh Valley Hospital Center, Inc.,* Civil Action No. 89-7315 (E.D. Pa. July 16, 1992). (A copy of the district court's unpublished "Order" is included in the attached Appendix beginning on A-9).

The district court's unpublished opinion disposing of petitioners' motions to dismiss, strike and for more specific pleading is captioned *Boyer v. Lehigh Valley Hospital Center, Inc.,* 1990 WL 94038 (E.D.Pa. July 2, 1990). (A copy of the district court's unpublished opinion is included in the attached Appendix beginning on A-11).

STATEMENT OF JURISDICTION

The court of appeals' unpublished memorandum opinion was filed on July 12, 1993. A Petition for Rehearing In Banc was filed on July 23, 1993. The court of appeals denied the Petition for Rehearing In Banc on August 2, 1993. (A copy of the court of appeals' order dated August 2, 1993, is included in the Appendix beginning on A-1). This Court's jurisdiction to review the court of appeals' ruling is bottomed upon 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§11101-11152 (1988), is the statute primarily involved in this case. (A copy of the HCQIA is included in the attached Appendix beginning on). (A-24).

The HCQIA's cost-shifting provision, which is pertinent to this petition, states the following:

> **§11113. Payment of reasonable attorney fees and costs in defense of suit.**
>
> In any suit brought against a defendant to the extent that a defendant has met the standards set forth under section 412(a) and the defendant substantially prevails, the court *shall*, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith. For the purposes of this section, a defendant shall not be considered to have substantially prevailed when the plaintiff obtains an award for damages or permanent injunctive or declaratory relief.

42 U.S. C. §11113 (emphasis added)(A-35,36).

STATEMENT OF THE CASE

This case of first impression presents an issue of overwhelming importance to the nation's hospitals and physicians, many of whom are, were or will be involved in time-consuming, expensive and vexatious peer review[2] litigation: namely, may federal courts ignore their HCQIA mandated duty to determine whether substantially prevailing peer review defendants are entitled to recover attorney's fees solely because unsuccessful plaintiffs had earlier been sanctioned, under Fed. R. Civ. P. 37, for egregious discovery abuse. If the HCQIA's cost-shifting provision is to discourage peer review litigation, as Congress intended, the Court's answer to this question should be a resounding "No".

Peer review litigation is typically brought by a physician or other medical practitioner who alleges that she has been unlawfully excluded from a hospital or other medical facility in violation of antitrust, civil rights, and various state laws. Defendants, usually the hospital and other physicians on the medical staff (plaintiff's "peers"), argue that plaintiff was excluded because of her incompetence, professional misconduct or inability to provide high-quality health care to patients. Peer review litigation therefore encompasses litigation over the granting, denial, restriction and revocation of hospital staff privileges and other means of formal access to institutional health-care providers. Charity Scott, *Medical Peer Review, Antitrust and the Effect of Statutory Reform*, 50 Md. L. Rev. 316, 318 n.5 (1991).

In this classic peer review litigation, Frank and Nancy Boyer, husband and wife, were cardiologists practicing at Lehigh Valley Hospital Center and Allentown Hospital. The Boyers' medical staff privileges were suspended at both hospitals in October 1987, after a confidential peer review, which examined, and found wanting, the Boyers' conduct and practice at the hospitals.

In retaliation, the Boyers instituted peer review litigation against the Lehigh Valley Hospital Center, Inc., ("Lehigh Valley Hospital"); Lehigh Valley Hospital Board of Directors and executive committee; the

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2. "Peer Review" is the evaluation and monitoring of the qualifications and skills of physicians by their colleagues with whom they practice at a particular health care facility. The purpose of peer review is to monitor the quality, appropriateness and necessity of the medical care provided to patients. Peer review is essential to the evaluation of the quality of the medical care rendered by health care professionals. Jeanne Darricades, *Medical Peer Review: How Is It Protected By The Health Care Quality Improvement Act Of 1986?*, 18 J. Contemp. L. 263, 266 (1992).

Allentown Hospital; Allentown Hospital Board of Directors and medical board; Confidential Peer Review, Ltd.; and seventeen (17) individual defendants (collectively referred to as the "peer review defendants").

The Boyers' Complaint alleged antitrust claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2; civil rights claims under 42 U.S.C. §§1983 and 1985(3); and state law claims involving intentional interference with existing and prospective contractual relations and intentional and negligent infliction of emotional distress. (A-12,13).

The district court, in response to the peer review defendants' motion to dismiss, threw out the Boyers' civil rights and negligent infliction of emotional distress claims. All other claims, including the federal antitrust claims, survived. (A copy of the district court's opinion on the motion to dismiss is included in the attached Appendix beginning on A-11). Nancy Boyer, thereafter, passed away. Plaintiff, Frank Boyer, filed an Amended Complaint, and discovery commenced.[3]

Peer review defendants were frustrated at every turn in their efforts to obtain discovery from plaintiffs. Plaintiffs willfully ignored, not only the peer review defendants' discovery, but district court orders compelling the Boyers to respond to this discovery on threat of sanctions.

For example, on or about December 18, 1990, peer review defendants served interrogatories and a request for production of documents upon the Boyers. Peer review defendants filed a motion to compel responses to this discovery on January 8, 1991.

Given the patent inadequacy of the Boyers' response to this discovery, the peer review defendants were forced to file a second motion to compel on April 16, 1991. The Boyers never responded to the second motion to compel.

On April 17, 1991, peer review defendants propounded expert witness interrogatories to which the Boyers never responded. The peer review defendants were then forced to file a third motion to compel. (A-4).

On June 12, 1991, district court granted peer review defendants' motions to compel and ordered the Boyers to pay the fees and costs peer review defendants incurred in filing these discovery motions. In addition, district court ordered the Boyers to respond to the specific interrogatories and document requests within ten (10) days or face sanctions

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3. Frank Boyer filed the Amended Complaint on his own behalf, and on his deceased wife's behalf, as the Administrator of her estate. After discovery commenced, Frank Boyer, through his counsel, exhibited utter indifference to the litigation he and his wife had brought against the peer review defendants.

under Fed. R. Civ. P. 37(b)(2). (A-5).

On July 25, 1991, more than one month *after* the expiration of the deadline set in the district court's orders, peer review defendants were forced to file a motion for sanctions. The Boyers never responded to this motion for sanctions, which sought to preclude them from offering any documentary or testimonial evidence sought in the unanswered discovery.

On December 10, 1991, approximately six (6) months after the district court entered its orders compelling discovery, the Boyers submitted untimely objections or insufficient answers to the outstanding discovery. Peer review defendants were then forced to file a fourth motion to compel and a renewed motion for sanctions. Again, the Boyers never responded to these motions.

On January 28, 1992, peer review defendants moved for summary judgment and requested costs and attorney's fees under, among other provisions, the HCQIA. On February 4, 1992, the district court, among other things, granted the peer review defendants' motion to compel and renewed motion for sanctions. The Boyers were then precluded from introducing evidence at trial concerning the subjects of the discovery to which they had not responded, and from introducing any expert testimony at trial. (A-5).

On July 13, 1992, district court granted summary judgment in favor of peer review defendants but denied their motion for costs and attorney's fees under, among other provisions, the HCQIA. *Id.* District court's *sole* rationale for refusing to award attorney's fees and costs under the HCQIA's cost-shifting provision was that the court had already sanctioned the Boyers, under Fed. R. Civ. P. 37, for "failure to engage in proper discovery":

> 7. The Court has already sanctioned Plaintiffs for their failure to engage in proper discovery. The February 4th order allowed Defendants to successfully move for summary judgment on all counts. The Court will not sanction Plaintiffs a second time by awarding Defendants attorney's fees and costs. Defendants' motions for attorney's fees and costs are DENIED.

(A- 10).

District court *never* conducted the substantive analysis of the Boyers' claims and litigation conduct mandated under the HCQIA's cost-shifting provision. Instead, the district court concluded that having sanctioned the Boyers under Fed. R. Civ. P. 37 for discovery abuse, peer review defendants were not, by that reason *alone*, entitled to recover

counsel fees and costs.

Peer review defendants appealed and the Boyers' cross-appealed.[4]

Court of appeals ruled that the district court did not abuse its discretion in declining to award counsel fees and costs. With respect to the Boyers' litigation conduct, the court of appeals upheld the district court's refusal to determine whether the Boyers' litigation conduct was "frivolous, unreasonable, without foundation, or in bad faith." (A-7,8). According to the court of appeals, because the district court had sanctioned the Boyers for egregious discovery abuses, the Boyers should not be sanctioned a second time under the HCQIA's cost-shifting provision. (A-7).

The court of appeals and district court, in effect, rendered the HCQIA's cost-shifting provision meaningless and flouted peer review defendants' statutory rights, by *refusing*, for a reason extraneous to the HCQIA, to determine whether the Boyers' litigation conduct entitled successful peer review defendants to recover attorney's fees and costs.

Although peer review defendants possess a statutory *right* to a judicial determination of entitlement to counsel fee recovery under the HCQIA, they lack a remedy because of the lower court's refusal to make this determination. A statutory *remedy*, without adjudication, enforcement and remedy, is a nullity.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because (1) petitioners, successful peer review defendants below, are entitled, under the HCQIA's cost-shifting provision, to a judicial determination of their right to recover attorney's fees and costs in light of the Boyers' litigation conduct; (2) the court of appeals and district court should not be permitted to frustrate the HCQIA's cost-shifting provision's primary purpose—to discourage peer-review litigation and therefore encourage active, good-faith peer review—by shielding unsuccessful plaintiffs from the HCQIA's cost-shifting provision's consequences merely because these plaintiffs had already been sanctioned for egregious discovery abuses; and (3) the court of appeals should not be permitted to judicially amend the HCQIA's cost-shifting provision by carving out a "prior discovery abuse" sanction immunity.

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4. The Boyers failed to file an appellate brief and their appeal was dismissed for failure to prosecute. (A- 5). The court of appeals possessed appellate jurisdiction over both appeals by virtue of 28 U.S.C.§ 1291.

I. THIS COURT SHOULD NOT PERMIT LOWER COURTS TO RENDER THE HCQIA'S COST-SHIFTING PROVISION'S DETERRENT EFFECT MEANINGLESS BY, IN EFFECT, IMMUNIZING ALREADLY SANCTIONED PEER REVIEW PLAINTIFFS

The unintended consequence of the court of appeals' *ad hoc* creation of a discovery abuse sanction exception to the HCQIA's cost-shifting provision is obvious: the virtual elimination of a major disincentive to frivolous, peer review litigation.

This is classic peer review litigation. The Boyers, husband and wife cardiologists, sued two hospitals, the hospitals' boards of directors and medical executive committees, an independent peer review organization and seventeen (17) individual defendants when, as a result of prior peer review, both hospitals suspended the Boyers' clinical privileges and medical staff membership.

Congress enacted the HCQIA in response to a perceived medical malpractice crisis. Congress found that "[t]he increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State." 42 U.S.C. §11101(1) (1988). The HCQIA represents Congress's efforts to lower the incidence of medical professional incompentence, in part by lowering the incidence of peer review litigation. Congress specifically found that the threat of peer review litigation—particularly that raising federal antitrust claims—inhibited doctors and hospitals from sanctioning incompetent physicians. The HCQIA was enacted to minimize that threat and to encourage physicians to police their peers:

> §11101. Findings
>
> The Congress finds the following: . . .
>
> (4) The threat of *private* money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

> (5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

42 U.S.C. §11101(4) and (5) (1988) (A-25,26).

The HCQIA's principal goal is to encourage active, good-faith peer review by discouraging peer-review litigation. 42 U.S.C. §11101 (4). Of the several disincentives Congress created to discourage peer review litigation, the HCQIA's cost-shifting provision, which requires courts to award costs, including reasonable attorney's fees, when an unsuccessful plaintiff's claim or litigation conduct is unreasonable or groundless, is most effective because it takes aim directly at the losing physician's wallet.[5]

The HCQIA's cost-shifting provision requires courts to award costs, including reasonable attorney's fees, to a substantially prevailing defendant if the plaintiff's claim or litigation conduct "was frivolous, unreasonable, without foundation, or in bad faith." 42 U.S.C. §11113 (1988). This cost-shifting provision emphasizes Congress's concern "over frivolous litigation in the peer review arena". *See* Charity Scott, *Medical Peer Review, Antitrust, and the Effect of Statutory Reform*, 50 Md. L. Rev. 316, 337 (1991). Section 11113 provides that:

> [i]n any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 412(a) and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including reasonable attorney's fees, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith. For the purposes of this section, a defendant shall not be considered to have substantially prevailed if the plaintiff obtains an award for damages or permanent injunctive or declaratory relief.

42 U.S.C. §11113 (1988) (A-35,36).

Peer review defendants, to recover attorney's fees and costs, must

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5. The other disincentives Congress created to deter peer review litigation include the presumption that the peer review defendants acted reasonably, provided fair procedures when they undertook their peer review activities and the granting of limited "immunity" to peer review participants. *See* 42 U.S.C.§§11111(a)(1) and 11112(a).

establish (1) coverage under §11111; (2) adherence to the standards required under §11112(a); (3) substantially prevailing status; and (4) that peer review plaintiff's claims or litigation conduct was frivolous, unreasonable, without foundation or in bad faith. *Wei v. Bodner*, 1992 WL 165860, *1 (D.N.J. April 8, 1992), *aff'd mem.*, 983 F.2d 1054 (3d Cir. 1992).

When peer review defendants prove, by a preponderance of the evidence, all of the above cost-shifting elements, courts are *required* to award defendants' attorney's fees and costs. Like Rule 11, the HCQIA provides that courts "shall impose" sanctions if the cost-shifting requirements are met. *See, e.g., Thomas v. Capital Sec. Serv., Inc.*, 836 F. 2d 866, 876 (5th Cir. 1988) (mandatory sanctions for violation of Rule 11); *ABA Standards and Guidelines For Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 122 (1988) (mandatory nature of sanctions). The award of attorney's fees and costs under the HCQIA is mandatory, not discretionary. *See also*, Charity Scott, *Medical Peer Review, Antitrust, and the Effect of Statutory Reform*, 50 Md. L. Rev. 316, 337-38 (1991).

The court of appeals assumed, in its memorandum opinion, that the peer review defendants satisfied the first three of the required cost-shifting elements. Neither the court of appeals nor district court, however, determined whether the Boyers' litigation conduct was "frivolous, unreasonable, without foundation, or in bad faith". Rather, both courts held that because the Boyers had already been sanctioned under Fed. R. Civ. P. 37, for egregious discovery abuse, the Boyers' litigation conduct was not reviewable under the HCQIA's cost-shifting provision. The practical effect of this judicially created "discovery abuse sanction" exception is to defang the HCQIA by neutralizing the cost-shifting provision's capability to deter peer review litigation.

In effect, the court of appeals and district court elected not to enforce the cost-shifting provision because losing plaintiffs had already been sanctioned for discovery abuses under Fed. R. Civ. P. 37. This *ad hoc* "discovery abuse sanction" exception, however, is unfair to substantially prevailing peer review defendants, ignores the HCQIA's plain meaning and thwarts Congress's purpose in enacting the HCQIA; namely, to deter peer review litigation thereby encouraging physicians to police their peers and weed out incompetent and unprofessional doctors.

II. THIS COURT SHOULD NOT PERMIT THE COURT OF APPEALS TO JUDICIALLY AMEND THE HCQIA'S COST-SHIFTING PROVISION BY EXEMPTING LOSING PLAINTIFFS WHO HAVE ALREADY BEEN SANCTIONED FOR EGREGIOUS DISCOVERY ABUSES

The court of appeals, upholding the district court's refusal to enforce the HCQIA's cost-shifting provision because the Boyers had already been sanctioned under Fed. R. Civ. P. 37 for egregious discovery abuses, has carved out an exemption offensive to the HCQIA's letter and spirit. The HCQIA does not contain a "prior discovery abuse sanction exception" to the cost-shifting provision. The statute's language is clear: peer review defendants, to recover counsel fees and costs, must establish (1) that they are among the persons covered by §11111; (2) that they followed the standards set forth in §11112(a); (3) that they substantially prevailed; and (4) that losing plaintiff's claim or litigation conduct was frivolous, unreasonable, without foundation or in bad faith. *Wei,* 1992 WL 165860, *1 (D.N.J. April 8, 1992). When successful peer review defendants, moreover, have satisfied all of the above elements, then courts must award attorney's fees and costs. The award of attorney's fees and costs under the HCQIA is mandatory, not discretionary. *Boyer v. Lehigh Valley Hospital Center,* No. 92-1702, slip op. at 5 (3d Cir. 1993). (A-6).

Both the court of appeals and district court, however, aborted the cost-shifting analysis. The court of appeals, although finding that the Boyers' litigation conduct "was far from model", never reached or resolved the issue whether that conduct was frivolous within the intendment of §11113. (A-6,7). Instead, the court of appeals, like the district court, short-circuited the analysis, never measuring the Boyers' litigation conduct against §11113's standards. Merely because the district court had already sanctioned the Boyers for egregious discovery abuses, the court of appeals, like the district court, declined to sanction the Boyers "a second time." (A-7).

The HCQIA does *not,* however, contain a "prior sanction" exemption. The court of appeals and district court have, in effect, created just such an exemption despite the absence of this exemption in the Act. If Congress had wanted to include a "prior sanction" exemption to the cost-shifting provision, it would have done so.

The statutory omission of a "prior sanction" exemption to the cost-shifting provision compels the conclusion that Congress never intended

to include this exemption. This Court has repeatedly held, moreover, that

> [w]e are not at liberty to imply a condition which is opposed to the explicit terms of the statute. . . . to [so] hold . . . is not to construe the Act but to amend it.

Fedorenko v. United States, 449 U.S. 490, 512-13 (1981); *see also West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1148 (1991) ("To supply omissions transcends the judicial function."); and *The Thomas Barlum*, 293 U.S. 21, 55 S. Ct. 31, 36 (1934) ("We are not at liberty to imply a condition which is opposed to the explicit terms of the statute").

The court of appeals' and district court's *ad hoc* creation of a "prior sanction exemption," in the face of clear statutory langague to the contrary, improperly amends the HCQIA's cost-shifting provision.

III. THE COURT OF APPEALS' CREATION OF A PRIOR SANCTION EXEMPTION TO THE HCQIA'S COST-SHIFTING PROVISION ENCOURAGES RATHER THAN DISCOURAGES FRIVOLOUS, UNREASONABLE AND BAD FAITH PEER REVIEW LITIGATION CONDUCT

The law of unintended consequences applies here. The court of appeals, by creating a non-statutory "prior sanction exemption," encourages, rather than discourages, frivolous, unreasonable and bad faith peer review litigation conduct. Thus, only losing peer review plaintiffs, who engage in the most egregious discovery abuses, and are therefore sanctioned for these abuses, will be protected from the cost-shifting provision. Losing plaintiffs who do not engage in egregious discovery abuse or who did, but were not sanctioned under Fed. R. Civ. P. 37, would, all things being equal, feel the cost-shifting provision's sting. The unintended consequence of the court of appeals' adoption of this "prior sanction exemption" is to protect and safeguard losing peer review plaintiffs who engage in the *most* egregious litigation misconduct. Congress clearly did not intend this absurd result.

The Third Circuit, therefore, *denies* counsel fee recovery to substantially prevailing peer review defendants that are most deserving. On the other hand, the Third Circuit *protects* losing peer review plaintiffs that engage in the most egregious litigation misconduct and are therefore least deserving of solicitude.

This absurd, unintended consequence makes a mockery of Congress' purpose in enacting the HCQIA; namely, to deter frivolous peer review litigation.

IV. THE COURT OF APPEALS ABUSED ITS DISCRETION IN AFFIRMING THE DISTRICT COURT'S DENIAL OF THE PEER REVIEW DEFENDANTS' MOTION FOR ATTORNEY'S FEES AND COSTS

The court of appeals applied an abuse of discretion standard in reviewing the district court's HCQIA cost-shifting determination.(A-6). A district court abuses its discretion when it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2461 (1990). Here, both the court of appeals and district court applied a patently incorrect legal standard; namely, a "prior sanction exemption."[6]

The existence of an abuse of a discretion standard begins, but does not end, our inquiry. While the district court possessed the discretion to determine whether the Boyers' litigation conduct was frivolous, unreasonable, without foundation or in bad faith, that court did *not* have the discretion to refuse to exercise its discretion and determine whether, under §11113, the Boyers' litigation conduct was sanctionable. For purposes of the successful peer review defendants' right to recover counsel fees under §11113, it is irrelevant that the district court had earlier sanctioned the Boyers for egregious discovery abuses under Fed. R. Civ. P. 37.

The court of appeals and district court are statutorily obligated to measure the Boyers' litigation conduct against the standards articulated at §11113. The court of appeals and district court may not evade this statutory obligation merely because the losing plaintiffs had already been sanctioned under the Federal Rules of Civil Procedure.

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6. *Cooter & Gell*, of course, is a Rule 11 decision. One commentator, however, has observed that the standards for imposing sanctions under Rule 11 and the HCQIA are identical. C. Scott, *Medical Peer Review, Antitrust, and the Effect of Statutory Reform*, 50 Md. L. Rev. 316, 339-41 ("Logically, it follows that, if the standards to title VII and rule 11 for imposing sanctions are effectively the same, and the standard of Title VII and HCQIA are largely identical, then the standards of rule 11 and HCQIA must likewise be the same."). As Scott observed, both rule 11 and the HCQIA "are rooted in the goal of deterring groundless litigation." *Id.* at 339 (footnote omitted).

Both the court of appeals and district court based their rulings denying the prevailing peer review defendants' motion to recover costs and attorney's fees on an incorrect legal standard. Therefore, both the court of appeals and district court abused their discretion when each court refused to determine whether the Boyers' litigation conduct was frivolous under §11113. The court of appeals and district court do *not* have the discretion to ignore their judicial responsibilities under the HCQIA.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant their Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

BY: _____
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Dated: October 18, 1993

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1702

LEHIGH VALLEY HOSPITAL CENTER;
JOHN A. KIBELSTIS, M.D.; DONALD J. BELMONT, M.D.;
MICHAEL H. GELLER, M.D.; CHARLES A. GORDON, M.D.;
ROBERT A. MORROW, M.D.; DONALD H. GAYLOR, M.D.;
BRUCE J. SILVERBERG, M.D.; JOHN J. SHANE, M.D.;
HEADLEY S. WHITE, M.D.; ALAN J. WOLSON, M.D.;
THE ALLENTOWN HOSPITAL, INC.;
DARRYL R. LIPPMANN, PRESIDENT;
WILLIAM W. FRAILEY, JR., M.D.; DEAN F. DIMICK, M.D.;
RICHARD KISNER; JANINE FIESTA;
CHARLES SCAGLIOTTI, M.D.;
CONFIDENTIAL PEER REVIEW, LTD.;
IRA MARTIN GRAIS, M.D.; MICHAEL ZEIHEN, M.D.;
MITCHELL ZIAKO, JR., M.D.;
THE BOARD OF DIRECTORS OF ALLENTOWN HOSPITAL;
MEDICAL BOARD OF ALLENTOWN HOSPITAL;
THE BOARD OF DIRECTORS OF THE LEHIGH VALLEY
HOSPITAL CENTER;THE EXECUTIVE COMMITTEE OF THE
MEDICAL STAFF OF LEHIGH VALLEY HOSPITAL CENTER

v.

FRANK R. BOYER, M.D.;
NANCY H. BOYER, M.D.

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and WEIS*, *Circuit Judges*

The petition for rehearing filed by Appellants Lehigh Valley Hospital Center; John A. Kibelstis, M.D.; Donald J. Belmont, M.D.; Michael H. Geller, M.D.; Charles A. Gordon, M.D.; Robert A. Morrow, M.D.; Donald H. Gaylor, M.D.; Bruce J. Silverberg, M.D.; John J. Shane, M.D.; Headley S. White, M.D.; Alan J. Wolson, M.D.; The Allentown Hospital, Inc.; Darryl R. Lippmann, President; William W. Frailey, Jr., M.D.; Dean F. Dimick, M.D.; Richard Kisner; Janine Fiesta; Charles Scagliotti, M.D.; Confidential Peer Review, Ltd.; Ira Martin Grais, M.D.; Michael Zeihen, M.D.; Mitchell Ziarko, Jr., M.D.; Board of Directors of Allentown Hospital; Medical Board of Allentown Hospital; The Executive Committee of the Medical Staff of Lehigh Valley Hospital in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Chief Judge

Dated: Aug 2, 1993

°. Senior Circuit Judge Joseph F. Weis, Jr. as to panel rehearing only.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-1702

FRANK R. BOYER, M.D.;
NANCY H. BOYER, M.D.

v.

LEHIGH VALLEY HOSPITAL CENTER;
JOHN A. KIBELSTIS, M.D.; DONALD J. BELMONT, M.D.;
MICHAEL H. GELLER, M.D.; CHARLES A. GORDON, M.D.;
ROBERT A. MORROW, M.D.; DONALD H. GAYLOR, M.D.;
BRUCE SILVERBERG, M.D.; JOHN J. SHANE, M.D.; HEADLEY S.
WHITE, M.D.; ALAN J. WOLSON, M.D.;
THE ALLENTOWN HOSPITAL, INC.;
DARRYL R. LIPPMANN, PRESIDENT;
WILLIAM W. FRAILEY, JR., M.D.; DEAN F. DIMICK, M.D.;
RICHARD KISNER; JANINE FIESTA;
CHARLES SCAGLIOTTI, M.D.;
CONFIDENTIAL PEER REVIEW, LTD.;
IRA MARTIN GRAIS, M.D.; MICHAEL ZEIHEN, M.D.;
MITCHELL ZIARKO, JR., M.D.; BOARD OF DIRECTORS OF
ALLENTOWN HOSPITAL; MEDICAL BOARD OF ALLENTOWN
HOSPITAL; THE EXECUTIVE COMMITTEE OF THE
MEDICAL STAFF OF LEHIGH VALLEY HOSPITAL,
Appellants

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 0313-2 : 89-07315)
District Judge: Hon- Daniel H. Huyett, 3rd

Submitted Pursuant to Third Circuit LAR 34.1
July 8, 1993

Before: SLOVITER, *Chief Judge*, NYGAARD, and
WEIS, *Circuit Judges*

(Filed July 12, 1993)

MEMORANDUM OPINION OF THE COURT

SLOVITER, *Chief Judge.*

This is an appeal from an order of the district court denying defendants' motion for costs and attorneys fees.

I.

Plaintiffs Frank and Nancy Boyer, husband and wife, were cardiologists practicing at Lehigh Valley Hospital Center and Allentown Hospital. The Boyers' staff privileges were suspended in October 1987, after a confidential peer review. They filed a complaint against both hospitals, Lehigh Valley Hospital's Board of Directors and Executive Committee, Allentown Hospital's Board of Directors and Medical Board, Confidential Peer Review, Ltd., and individuals whom they alleged had participated in the peer review process. The complaint alleged antitrust and civil rights violations, tortious interference with existing and prospective contractual relations, and intentional and negligent infliction of emotional distress.

Defendants moved to dismiss the complaint, which the district court granted in part, dismissing the civil rights claims and the claim for negligent infliction of emotional distress. The court also granted plaintiffs leave to amend their complaint.

Thereafter, plaintiff Nancy Boyer passed away. Plaintiff Frank Boyer filed an amended complaint, and discovery commenced.[1] The Allentown Hospital defendants (hereinafter collectively referred to as defendants) propounded discovery on plaintiffs, but plaintiffs served their response at defense counsel's Allentown office instead of its Philadelphia office, which triggered a motion to compel. Defendants then filed another motion to compel based on the adequacy of plaintiffs' response, to which plaintiffs did not respond.

On April 17, 1991, defendants propounded expert witness interrogatories, but plaintiffs did not respond, and defendants filed a third motion to compel. Plaintiffs then noticed depositions for certain individual defendants, which defendants countered with a motion for a protective order seeking reimbursement for the deponents' travel and lodging expenses. Plaintiffs did not respond to this motion.

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1. Frank Boyer filed the amended complaint on his own behalf and on his wife's behalf, as the administrator of her estate.

On June 12, 1991, the court granted defendants' motions to compel and its motion for a protective order and ordered plaintiffs to pay the fees and costs that defendants had incurred in filing the motions. In addition, it ordered plaintiffs to respond to specific interrogatories and document requests within ten days or face sanctions under Federal Rule of Civil Procedure 37(b)(2), and ordered them to pay the expenses of the individuals whom they sought to depose.

Plaintiffs did not produce the discovery in the ten days ordered by the court and defendants filed a motion for sanctions. Plaintiffs did not respond to the motion, but on December 10, 1991, they produced discovery and noticed a deposition. Defendants then filed a motion for protective order, a motion to compel, and renewed motion for sanctions.

On January 28, 1992, defendants moved for summary judgment and requested costs and attorneys' fees. On February 4, 1992, the district court granted defendants' motion for a protective order and ordered plaintiffs to pay the fees and costs defendants had incurred in filing the motion. It also granted defendants' motion to compel and renewed motion for sanctions, precluding plaintiffs from introducing evidence at trial concerning the subjects of the discovery to which they had not responded, and from introducing any expert testimony at trial because they had not answered defendants' discovery concerning expert witnesses. On July 13, 1992, the district court granted summary judgment in favor of defendants and denied their motion for costs and attorneys' fees.

Plaintiffs appealed and defendants cross-appealed.[2] Defendants argue on appeal that plaintiffs' claims and conduct of the litigation were frivolous and unreasonable, and that defendants should have been awarded fees and costs under the Health Care Quality Improvements Act of 1986 ("HCQIA"), 42 U.S.C. § 11101 *et seq.*, Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, or the court's inherent powers.

II.

Section 11113 of the HCQIA is a fee-shifting provision and states that:

> In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title and the defendant substantially prevails,

2. Plaintiffs failed to file an appellate brief and their appeal was dismissed for failure to prosecute.

> the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

42 U.S.C. § 11113.[3] Thus, under the statute, a court must award fees and costs if statutory standards are met, a defendant substantially prevailed, and a plaintiff's claim or conduct was "frivolous, unreasonable, without foundation, or in bad faith."[4]

Defendants argue that the statutory standards have been satisfied, that they substantially prevailed, and that plaintiffs' antitrust claims were frivolous[5] and its conduct of the litigation unreasonable. Whether a party's claims or conduct is frivolous or unreasonable is a question committed to the discretion of the district court. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

The district court in the instant case did not specifically state that it found plaintiffs' claim or conduct to be non-frivolous, but it rejected defendants' argument for sanctions by saying that:

> The Court has already sanctioned Plaintiffs for their failure to engage in proper discovery. The February 4th order allowed Defendants to successfully move for summary judgment on all counts. The Court will not sanction Plaintiffs a second time by awarding Defendants attorney's fees and costs.

Supp. App. at 3. Assuming without deciding that defendants satisfied the statutory conditions and that they substantially prevailed, the instant case is one that ultimately turns on the degree of deference that goes hand-in-hand with the abuse of discretion standard.

In our analysis, plaintiffs' antitrust claims were at least arguable, and the district court agreed, since it denied the motion to dismiss as to

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3. Section 11112(a) of the HCQIA is a set of standards that a professional review action must meet to safeguard the procedural rights of a physician under review.

4. This standard was derived from the cost-shifting provision of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5. :*See* Scott, *Medical Peer Review and Antitrust*, 50 Md.L.Rev. 316, 338 (1991).

5. Defendants' argument as to the frivolousness of plaintiffs' claims is directed only at plaintiffs' antitrust claims, and not their other claims. Appellants' Brief at 24-28.

those claims. On the other hand, plaintiffs' conduct of the litigation was far from model. However, the district court did sanction plaintiffs for their conduct, and the language quoted above demonstrates that it was keenly aware that it had "already" sanctioned plaintiffs when it declined to sanction them "a second time."

In addition, the district court was mindful that it had also sanctioned plaintiffs another way, by barring them from introducing expert testimony at trial, which made inevitable the success of defendants' summary judgment motion. The court acknowledged as much when it granted summary judgment, saying that, "The effect of the February [4th] order was to preclude the introduction of evidence on most of the elements of Plaintiffs' federal and state claims. Therefore, no issue of genuine material fact exists and summary judgment in favor of Defendants is appropriate." Supp. App. at 2-3. In fact, a reading of the court's memorandum opinion makes clear that it was granting summary judgment because of plaintiffs' anticipated proof problems, and not because of any inherent lack of merit to their antitrust claims. In these circumstances, we are not prepared to hold that the court's decision not to award fees and costs constitutes an abuse of discretion.

Our conclusion is buttressed by *Johnson v. Nyack Hosp.*, 964 F.2d 116 (2d Cir. 1992), in which that court also upheld a district court's decision not to award fees and costs against a doctor under the HCQIA. The court there said that a doctor's antitrust claim was not frivolous because he had "brought suit to obtain judicial review of defendants' decision to terminate the privileges that he had worked hard to obtain," and also that the doctor's conduct was not "so reprehensible" or "so objectionable" as to require reversal of the district court's decision not to award fees and costs. Likewise, we decline to reverse the district court here.

Although the Third Circuit has not specifically addressed the issue of costs under the HCQIA, our authority is not to the contrary. In *Mindek v. Rigatti*, 964 F.2d 1369 (3d Cir. 1992), the plaintiffs "continually flouted court orders and denigrated the authority of the magistrate judge to whom their case was assigned," and this egregious misconduct spanned a four year period. 964 F.2d at 1370. The district court in *Mindek* dismissed the plaintiffs' complaint as a sanction because of their misconduct, but also declined to sanction the plaintiffs monetarily. We upheld this decision, and with respect to the declination of costs said:

> We observe that the district court chose not to impose monetary sanctions against the Mindeks, apparently because the magistrate judge had deemed such sanctions inappropriate in

> light of the Mindeks' *in forma pauperis* status. This decision not to impose monetary sanctions, like the decision to dismiss the Mindeks' complaint, falls squarely within the district court's discretion and, once again, requires our deference.

964 F.2d at 1374.

Finally, after review of the record, we reject appellants' claims that the district court erred when it declined to award defendants fees and costs under Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, or the court's inherent powers.

Although we in no way approve of plaintiffs' conduct in the course of this litigation, for the reasons set forth we will affirm the order of the district court denying attorneys' fees and costs.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Dolores K. Sloviter
Dolores K. Sloviter
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK R. BOYER, M.D. and NANCY H. BOYER, M.D.,	:	
Plaintiffs	:	CIVIL ACTION
v.	:	NO. 89-7315
LEHIGH VALLEY HOSPITAL CENTER, INC., et al.,	:	
Defendants	:	

ORDER

HUYETT, J. July 13, 1992

Upon consideration of Defendant Lehigh Valley Hospital's motion for summary judgment, Defendant Allentown Hospital's motion for summary judgment, Plaintiffs' response, and because:

1. Subsequent to the filing of Defendants' motions for summary judgment, the Court handed ~~down an~~ order on February 4, 1992, granting Defendants' motion for discovery sanctions and precluding Plaintiffs from introducing the following evidence:

a) testimonial and/or documentary evidence at trial, the subject matter of which was inquired into by Defendants' general interrogatories numbered 8, 36, 44, 45, 52-54, 57, 62-86, 90, and 91; and

b) testimonial and/or documentary evidence, the subject matter of which was inquired into by Defendants' unanswered expert interrogatories and requests for production of documents.

Defendants filed a supplemental brief asking for summary judgment based on Plaintiffs' inability to introduce evidence on almost all material issues in the case. Plaintiffs have not responded to Defendants' supple-

mental brief or the effects of the February 4th order.

2. Plaintiffs' amended complaint states causes of action for violation of Sections One and Two of the Sherman Antitrust act, 35 U.S.C. §§ 1,2, and pendant state claims for tortious interference with existing and prospective contractual relations and intentional and negligent infliction of emotional distress.

3. By virtue of the Court's February 4th order, Plaintiffs are barred from introducing any evidence regarding the following: conspiracy, effects of Defendants' actions on interstate commerce, anticompetitive effect of Defendants' actions, infliction of emotional distress, and damages.

4. The February 4th order precludes Plaintiffs from introducing any evidence that Defendants sought in their request for production of documents. Defendants' request for production covered evidence regarding both liability and damages. Also, Plaintiffs are barred from introducing expert evidence with regard to liability and damages.

5. The effect of the February 24th order is to preclude the introduction of evidence on most of the elements of Plaintiffs' federal and state claims. Therefore, no issue of genuine material fact exists and summary judgment in favor of Defendants is appropriate. *See, e.g., Pirolo v. City of Clearwater*, 711 P-2d 1006, 1012 (11th Cir 1983); *Transportes Aereos de Angola v. Ronair, Inc.*, 693 F. Supp. 102, 107 (D. Del. 1988).

6. Additionally, because Defendants are entitled to summary judgment on their federal claims, the Court no longer has supplemental jurisdiction over the state law claims.

7. The Court has already sanctioned Plaintiffs for their failure to engage in proper discovery. The February 4th order allowed Defendants to successfully move for summary judgment on all counts. The Court will not sanction Plaintiffs a second time by awarding Defendants attorney's fees and costs.

Accordingly, Defendants' motions for summary judgment are GRANTED on all counts and JUDGMENT is ENTERED in favor of Defendants and against Plaintiffs. Defendants' motions for attorney's fees and costs are DENIED.

IT IS SO ORDERED.

/s/ Daniel H. Huyett, 3rd
Daniel H. Huyett, 3rd, Judge

Not Reported in F.Supp.
(Cite as: 1990 WL 94038 (E.D.Pa.))

Frank R. BOYER, M.D., and Nancy H. Boyer, M.D.
v.
LEHIGH VALLEY HOSPITAL CENTER, INC., et al.
CIV. A. No. 89-7315.
United States District Court, E.D. Pennsylvania.
July 2, 1990.

John P Karoly, Jr., Karoly Law Offices, Allentown, Pa., for plaintiffs.

Richard F. Stevens, Allentown, Pa., for Lehigh Valley Hospital Center, Inc., John A. Kibelstis, M.D., Donald J. Belmont, M.D., Michael H. Geller, M.D., Charles A. Gordon, M.D., Robert A. Morrow M.D., Donald H. Gaylor, M.D., Bruce J. Silverberg, M.D., John J. Shane, M.D., Headley S. White, M.D., Alan J. Wolson, M.D., Janine Fiesta, the Board of Directors of Lehigh Valley Hospital Center and the Executive Committee of the Medical Staff of Lehigh Valley Hospital.

MEMORANDUM AND ORDER

HUYETT, Senior District Judge.

*1 As a result of the denial of their hospital staff privileges, plaintiffs Frank R. Boyer, M.D., and Nancy H. Boyer, M.D., instituted this litigation against the Lehigh Valley Hospital Center, Inc. ("Lehigh Valley Hospital"); Lehigh Valley Hospital's Board of Directors and Executive Committee; the Allentown Hospital; Allentown Hospital's Board of Directors and Medical Board; Confidential Peer Review, Ltd.; and seventeen (17) individual defendants. Defendants collectively seek dismissal of plaintiffs' complaint under various subsections of Rule 12 of the Federal Rules of Civil Procedure.

I. STANDARD OF REVIEW

In resolving a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted, the court must accept as true all the well-pleaded allegations of the complaint, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable interpretation of the pleadings, the plaintiff may be entitled to relief. Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3d Cir. 1985); *Helstoski v. Goldstein*, 552 F.2d 564, 565 (3d Cir. 1977) (per curiam). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957).

II. FACTS

Taking as true the allegations in the complaint, the facts giving rise to this action are as follows. Plaintiffs are board-certified cardiologists duly licensed to practice medicine in the Commonwealth of Pennsylvania. Plaintiffs belong to a conservative cardiological school of practice whose teachings recommend surgery as a last, rather than first, resort.

In retaliation against plaintiffs' "patient advocacy" and criticism of defendants' purported "fraudulent and negligent acts," the institutional and individual defendants conspired to, among other things, suspend plaintiffs' staff privileges. The governing bodies of Allentown Hospital and Lehigh Valley Hospital suspended plaintiffs' staff privileges on October 11, 1987 and October 16, 1987, respectively. These suspensions have precluded plaintiffs from practicing cardiology in the "Allentown area."

Plaintiffs' complaint lumps together several claims for relief without organization or distinction. Whenever a separation of claims "facilitates the clear presentation of the matters set forth," each claim for relief must be stated in separate counts. Fed.R.Civ.P. 10(b). Despite this requirement, plaintiffs' confusing complaint does not contain any counts.

Notwithstanding plaintiffs' murky pleading, the following claims are discernable: (1) a claim under 42 U.S.C. § 1983; (2) a claim under 42

U.S.C. § 1985(3); (3) a claim under section 1 of the Sherman Act, 15 U.S.C. § 1; (4) a claim under section 2 of the Sherman Act, 15 U.S.C. § 2; (5) a claim for intentional interference with contractual relations; (6) a claim for intentional interference with prospective contractual relations; (7) a claim for intentional infliction of emotional distress; and (8) a claim for negligent infliction of emotional distress.

III. DISCUSSION

*2 A. Defendants' Motion Under Rule 12(b)(6)

1. Federal Claims

a. Claim under 42 U.S. C. § 1983

Plaintiffs apparently contend that defendants' conduct violated plaintiffs' free speech rights under the first and fourteenth amendments. Plaintiffs further contend that defendants suspended their staff privileges without affording them procedural due process as guaranteed under the fourteenth amendment due process clause. Defendants argue that plaintiffs' claim under section 1983 for violations of their constitutional rights should be dismissed for failure to allege state action.

In response, plaintiffs maintain that the enactment of the Health Care Quality Improvement Act of 1986 ("HCQIA" or "Act"), 42 U.S.C. §§ 11101-52, provides the requisite state action. Plaintiffs argue that the requisite state action is created as a result of the federal and state governments involvement in professional peer reviews pursuant to HCQIA. Plaintiffs, however, cite no authority for this "creative" contention.

The key question in determining whether a private party's actions constitute "state action" under the fourteenth amendment is whether the party's actions may be "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). In order for the private party's actions to be "fairly attributable to the state," plaintiffs must demonstrate "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

Congress enacted the HCQIA in an attempt to reduce the number of incompetent physicians. Congress sought, through enactment of the HCQIA, to mitigate the threat of liability confronting participants in physician peer reviews. 42 U.S.C. § 11101. Therefore, HCQIA elimi-

nates many deterrents to effective and aggressive peer review of physician competence and conduct by providing immunity, under federal and state law, from damage suits against peer review groups and individuals acting in support of these groups. 42 U.S.C. § 11111(a). However, the Act does preserve civil rights actions. Id.

The Act's granting of peer review immunity, however, is conditioned on two factors. First, a peer review group must provide sufficient due process protection to a physician subjected to peer review. 42 U.S.C. § 11112. The Act specifically details the procedures which Congress deemed to be appropriate due process, and creates a rebuttable presumption that the peer review group met the due process requirements even if the group did not follow the Act's procedures. Id. Second, the peer review group must take the disciplinary action with the reasonable belief that the action will further quality health care. Id.

The peer review protection provisions set forth in the Act merely conditionally immunize peer review groups and individuals acting in support of these groups. The Act does not impose mandatory regulations over the conduct of private entities. Therefore, it stands to reason that, if the invasive state regulation of a private entity is not sufficient to create state action, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51 (1974), the federal government's mere granting of conditional immunity, standing alone, falls short of converting private parties into state actors.

*3 It is also well-established that a private entity's curtailment of a physician's staff privileges cannot be attributed to the state even when the private entity's decision was made pursuant to a state-created and approved peer review process. See *Pinhas v. Summit Health, Ltd.*, 880 F.2d 1108, 1117-18 (5th Cir. 1989); *Ezpeleta v. Sisters of Mercy Health Corp.*, 800 F.2d 119, 122-23 (7th Cir. 1986) *Gross v. Memorial Hosp. System*, 789 F.2d 353, 356 (5th Cir. 1986); see, e.g., *Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984).

Consequently, plaintiffs' claim under section 1983 for violations of the first and fourteenth amendments shall be dismissed under Rule 12(b)(6) because plaintiff has failed to establish the requisite state action

b. Claim Under 42 U.S.C. § 1985(3)

To state a claim under section 1985(3), plaintiffs must plead (1) the existence of a conspiracy; (2) to deprive them of equal protection of the laws; (3) that the conspiracy was motivated by racial or other class-based invidiously discriminatory animus; (4) that defendants committed an overt act to further the conspiracy and; (5) that plaintiffs were injured in their person or property and deprived of rights and privileges guaranteed by the Constitution. *Griffin v. Breckenridge*, 403 U.S. 88, 103-04 (1971); *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1172-73 (3d Cir. 1978).

In *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979), the Supreme Court observed that section 1985(3) is a remedial, not a substantive, statute. Id. at 376. Therefore, in order to obtain relief under section 1985(3), the plaintiff must be able to invoke the protection of an independently grounded federal right. See *Wong v. Stripling*, 881 F.2d 200, 203 (5th Cir. 1989) ("Section 1985, however, does not itself provide substantive rights. The rights sought to be vindicated must be found elsewhere.").

Section 1985(3) protects against violations of the equal protection clause of the fourteenth amendment, rather than the due process clause. *United Brotherhood of Carpenters and Joiners v. Scott*, 463 U.S. 825, 834 (1983); *Briscoe v. Bock*, 540 F.2d 392, 393 (8th Cir. 1976). In the present case, plaintiffs assert only that defendants conspired to deprive them of procedural due process and allege no conspiracy to deprive them of equal protection of the laws. See Complaint at ¶¶ 13, 16, 17, and 24. Hence, plaintiffs have not set forth the second element of a claim under section 1985(3).

In addition, plaintiffs fail to allege a "class based, invidiously discriminatory animus" on the part of the defendant conspirators, which is the third element of a claim under section 1985(3). Griffin, 403 U.S. at 102. Plaintiffs' complaint does not support even an inference of class-based animus. Even assuming that plaintiffs constitute a "class" because of their "patient advocacy" and espousal of conservative care and treatment of cardiological problems, this is not the type of class protected under section 1985(3). See, e.g., *Jackson v. Norton-Children's Hosps.*, 487 F.2d 502, 503 (6th Cir. 1973), cert. denied, 416 U.S. 1000 (1974) (no class-based animus in a suit brought by a discharged physician against a hospital); *Ward v. St. Anthony Hosp.*, 476 F.2d 671, 676 (10th Cir. 1973) (no class-based animus in a physician's suit against a hospital); *Bricker v. Crane*, 468 F.2d 1228, 1232-33 (1st Cir. 1972) (physician had no claim under section 1985(3) because he failed to allege class-based discrimina-

tion)

*4 Although "[s]tate action is not an essential element of a [section] 1985(3) claim, . . . 'when the alleged conspiracy is aimed at a right that is by definition a right only against state interference,' the plaintiff must prove state involvement." Wong, 881 F.2d at 203 (quoting *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833 (1983)). In the present case, plaintiffs allege that defendants conspired to deprive them of their constitutional rights guaranteed by the fourteenth amendment, which are by definition rights against state interference. Consequently, just as under section 1983, plaintiffs must establish state involvement. See supra section II(A)(1)(a).

Because plaintiffs have failed to allege (1) a deprivation of the equal protection of the laws, (2) a conspiracy motivated by a "class-based, invidiously discriminatory animus", (3) state involvement, and because I conclude that plaintiffs will be unable to prove any set of facts in support of their section 1985(3) claim, plaintiffs' claim under 1985(3) must fail.

c. Claims under the Sherman Act [FN1]

With respect to plaintiffs' claims under the Sherman Act, defendants first contend that this court lacks subject matter jurisdiction over the antitrust claims because plaintiffs failed to allege the requisite interstate commerce nexus.

This jurisdictional interstate commerce nexus may be established in one of two ways: (1) the proscribed conduct itself may be in interstate commerce or (2) the conduct may be purely intrastate activity having a substantial and adverse affect upon interstate commerce. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 246 (1980); *Weiss v. York Hospital*, 745 F.2d 786, 824 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985).

Despite the clear jurisdiction mandate in section 1 of the Sherman Act, plaintiffs have failed to adequately plead a nexus with interstate commerce. [FN2] Because I believe that plaintiffs "could demonstrate that the denial of their staff privileges affects their activities in interstate commerce," *Pontius v. Children's Hosp.*, 552 F.Supp. 1352, 1361 (W.D.Pa. 1982), I shall grant them leave to amend their complaint to allege the requisite to interstate commerce.

Second, defendants maintain that plaintiffs' claims under section 1 and section 2 of the Sherman Act should be dismissed for failure to state a claim upon which relief may be granted. Defendants argue that plaintiffs' "complaint is drafted in such broad-brush, ill-defined terms that the elements of . . . Section 1 [and Section 2] Sherman Act claim[s] appear, if at all, only in vague silhouette." See Defendants' Memorandum of Law in Support of Defendants' Motions to Dismiss Plaintiffs' Complaint Under Federal Rule of Civil Procedure 12, at 13.

Section 1 of the Sherman Act declares illegal any contract or conspiracy "in restraint of trade or commerce among the several States." 15 U.S.C. § 1. To establish a claim under section 1 of the Sherman Act, plaintiffs are required to plead (1) that defendants contracted, combined, or conspired with each other; (2) that the combination or conspiracy produced adverse, anti- competitive effects within relevant product and geographic markets; (3) that the object of the conduct pursuant to that contract or conspiracy was illegal: and (4) that the plaintiffs were injured as a proximate result of the conspiracy. See, e.g., *Pao v. Holy Redeemer Hosp.*, 547 F.Supp. 484, 491 (E.D.Pa. 1982).

*5 In paragraph 9 of the complaint, plaintiffs identify the conspirators. Paragraphs 11 through 17 specify the actions taken by some of the conspirators in furtherance of the illegal purpose of the conspiracy, and in some instances include dates on which those actions occurred, as well as the injuries which plaintiffs incurred as a direct and proximate result of the actions taken by the conspiracy. The illegal purpose of the conspiracy is covered in paragraphs 18 through 24 and includes: (1) the deprivation of civil rights, (2) the infliction of emotional distress, (3) the reduction of competition, an attempt to gain monopoly power, (4) the interference with contractual relationships, and (5) the termination of plaintiffs' means of livelihood. In paragraphs 19 and 20, plaintiffs sufficiently alleged the requisite antitrust injury to competition to the medical specialty of cardiology in the Allentown area. [FN3]

Section 2 of the Sherman Act prohibits anyone from monopolizing, attempting to monopolize, or conspiring to monopolize any part of interstate commerce. 15 U.S.C. § 2. The essential elements of an attempt-to-monopolize claim are (1) a specific intent to monopolize the relevant products and geographic markets; and (2) such existing market power that there is a dangerous probability of success. See Pontius, 552

F.Supp. at 1376. The essential elements of a conspiracy-to-monopolize claim are (1) an agreement or understanding between two or more economic entities; (2) a specific intent to monopolize; and (3) the commission of an overt act in furtherance of the alleged conspiracy. Id. at 1377.

A fair reading of paragraph 16 of the complaint shows that plaintiffs have set forth the elements necessary for an attempt-to-monopolize claim. In paragraph 16, plaintiffs allege:

Defendant Allentown Hospital and the individual Defendants, members of its Medical Board, did, on or about October 11, 1987, vote to suspend the hospital privileges and credentials of the plaintiffs . . . in an attempt to monopolize the Allentown area market in the medical specialty of cardiology, knowing that the suspension of said privileges and credentials would effectively eliminate the Plaintiffs' ability to continue their medical practice without the ability to admit and treat patients at a local hospital which is capable of providing medical support to a cardiac patient.

In addition, a fair reading of paragraph 17 of the complaint shows that plaintiffs set forth the elements necessary for a conspiracy-to-monopolize claim. In paragraph 17, plaintiffs allege:

[O]n or about October 16, 1987, acting in collusion with the Defendant, Allentown Hospital, and the individual Defendants, members of the Allentown Hospital Medical Board, the Defendant, Lehigh Valley Hospital Center, and the individual Defendants, members of the Lehigh Valley Center Executive Committee of the Medical Staff, did vote to suspend the privileges and credentials of the Plaintiffs at Lehigh Valley Hospital Center. . . in furtherance of a contract, combination, or conspiracy in restraint of trade and to monopolize the Allentown area market in the medical specialty of cardiology. . .

*6 Although I agree with defendants that plaintiffs' complaint is inartfully drafted, I conclude that plaintiffs have pled the requisite elements for claims under section 1 and section 2 of the Sherman Act. Therefore, I shall deny defendants' motion to dismiss with respect to plaintiffs' antitrust claims.

2. State Claims

a. Claims for Intentional Interference with
Contractual Relations and
Prospective Contractual Relations

Defendants contend that plaintiffs' complaint fails to set forth a claim for intentional interference with contractual relations and prospective contractual relations because (1) plaintiffs fail to allege any contractual relationships with any of their patients and (2) plaintiffs fail to allege defendants' lack of privilege or justification for the interference with contractual relations.

Defendants' contentions are without merit. In paragraph 11(v) of the complaint, plaintiffs allege that defendants interfered "with Doctor-patient relationships" and engaged in covert and overt "acts calculated to undermine patient confidence in the plaintiffs' and in their conservative practices." In paragraph 22 of the complaint, plaintiffs allege that "the actions of the defendants have deprived the plaintiffs of the opportunity to develop and expand their medical practice."

The relationship between a doctor and his patient is clearly a contractual relationship. The doctor agrees to provide medical services to the patient and, in exchange, the patient agrees to pay a fee to the doctor. Therefore, plaintiffs have pled the contractual relations with which defendants allegedly interfered. In addition, I conclude that plaintiffs have impliedly alleged in their complaint that defendants did not have a privilege or justification for their interference.

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(Cite as: 1990 WL 94038, *6 (E.D.Pa.))

Defendants are reminded that the purpose of a complaint is simply to put defendants on notice of the essence of plaintiffs' claim(s) with sufficient clarity to enable defendants to answer. It is clear from defendants' motion to dismiss that defendants have been put on notice of plaintiffs' claims against them. The pleadings are not designed to provide evidence. Pretrial discovery mechanisms, such as depositions and interrogatories, are the means by which evidence is obtained and scrutinized.

b. Claim for Intentional Infliction of Emotional Distress

Defendants maintain that this court should dismiss plaintiffs' claim of intentional infliction of emotional distress because plaintiffs have failed to set forth allegations of the extreme and outrageous conduct necessary for recovery.

In order for plaintiffs to recover under a claim for intentional infliction of emotional distress, defendants' actions must be extreme and outrageous. See *Pierce v. Penman*, 357 Pa.Super. 225, 240, 515 A.2d 948, 951 (1986). Whether defendants' actions rise to the level of outrageous, however, is a determination made by the fact finder. Therefore, plaintiffs shall be permitted discovery on this claim.

c. Claim for Negligent Infliction of Emotional Distress

*7 Defendants contend that plaintiffs' claim for negligent infliction of emotional distress should be dismissed because plaintiffs have failed to allege any actions of defendants that set forth the requisite elements of the claim.

For the claim of negligent infliction of emotional distress to be actionable, plaintiff's emotional distress must be accompanied by physical impact or its threat, or arise from the contemporaneous observance of injury to a family member. See *Miller v. Aluminum Co. of America*, 679 F.Supp. 495, 508 (W.D.Pa. 1988); *Brooks v. Hickman*, 570 F.Supp. 619, 619-20 (W.D.Pa. 1983).

In the present case, defendants' alleged actions do not involve any physical impact-actual, threatened, or vicarious. Consequently, plaintiffs' claim for negligent infliction of emotional distress must fail.

B. Defendants' Motion Under Rule 12(e)

Defendants move for a more definite statement under Rule 12(e) with respect to those claims which this court does not dismiss. Defendants maintain that plaintiffs' inartfully drawn allegations violate the letter and spirit of Rule 10(b) and are so vague that defendants cannot reasonably be required to frame a responsive pleading.

Rule 10(b) provides that "each claim founded upon a separate transaction or occurrence . . . be stated in a separate count . . . whenever a separation facilitates the clear presentation of the matter set forth." When a pleading is rendered vague and ambiguous because different

claims are not separated into counts, a Rule 12(e) motion for a more definite statement may be used to raise objections of non-compliance with Rule 10(b). See *Jenn-Air Products Co. v. Penn Ventilator, Inc.*, 283 F.Supp. 591, 595 (E.D.Pa. 1968); 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1324 (1969 & Supp.1989). The requirement that plaintiffs allege separate causes of action in separate counts becomes even more compelling when, as in the present case, multiple plaintiffs confront multiple defendants. With respect to multiple defendants, courts require, for the sake of clarity, that plaintiffs specify which claims are asserted against which defendants. See *Miller v. Indiana Hosp.*, 662 F.Supp. 1259, 1270-72 (W.D.Pa. 1983).

Defendants also request a more definite statement with respect to several aspects of plaintiffs' complaint.

I have considered all of defendants' requests and conclude that plaintiffs should file an amended complaint which shall include the following:

1. a more definite statement setting forth separate claims for relief in sequentially numbered counts and specifying which claims are asserted against which defendants;

2. a more definite statement of an interstate commerce nexus under sections 1 and 2 of the Sherman Act;

3. a more definite statement setting forth the specific section(s) of the hospitals' bylaws which defendants allegedly violated;

4. a more definite statement specifying under which claims for relief punitive damages are sought.

***8 C. Defendants' Motion Under Rule 12(f)**

Defendants request this court pursuant to Rule 12(f) to strike plaintiffs' ad damnum clause, which demands damages in specific dollar amounts, because it violates Rule 30 of the Local Rules of Civil Procedure. [FN4] Local Rule 30 provides:

No pleading asserting a claim for unliquidated damages shall contain any allegation as to the specific dollar amount claimed, but such pleadings shall contain allegations sufficient to establish the jurisdiction of the court, to reveal whether the case is or is not subject to arbitration under Local Rule 8, and to specify the nature of damages claimed, e.g.,

'compensatory,' 'punitive,' or both.

Mindful of juror prejudice that may result from allegations of purely arbitrary figures in ad damnum clauses, federal courts have stricken clauses requesting relief in specific dollar amounts, other than those amounts necessary to establish jurisdiction and reveal whether the case is subject to arbitration See, e.g., *R.S.E., Inc. v. Pennsy Supply, Inc.*, 77 F.R.D. 702, 703 (M.D.Pa. 1977); *A. v. B.*, 46 F.R.D. 456, 457 (W.D.Pa. 1969). Consequently, defendants' motion to strike plaintiffs' ad damnum clause shall be granted. Plaintiffs' amended complaint shall include an ad damnum clause that complies with Local Rule 30.

IV. CONCLUSION

For the reasons set forth above, I shall grant in part and deny in part defendants' motion to dismiss.

An appropriate order follows.

ORDER

Upon consideration of defendants' motion to dismiss, plaintiffs' response, the parties supporting memoranda, and for the reasons stated in the attached memorandum,

IT IS ORDERED THAT:

1. Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART.

2. Plaintiffs' claims under 42 U.S.C. §§ 1983 and 1985(3) are DISMISSED WITH PREJUDICE.

3. Plaintiffs' claim for negligent infliction of emotional distress is DISMISSED WITH PREJUDICE.

4. Plaintiffs are granted leave to amend their complaint. Within twenty (20) days from the date this order is docketed by the Clerk, plaintiffs shall file and serve an amended complaint which shall include the following:

a. a more definite statement setting forth separate claims for relief in sequentially numbered counts and specifying which claims are asserted against which defendants;

b. a more definite statement of an interstate commerce nexus under sections 1 and 2 of the Sherman Act;

c. a more definite statement setting forth the specific section(s) of

the hospitals' bylaws which defendants allegedly violated;

d. a more definite statement specifying under which claims for relief punitive damages are sought.

e. an ad damnum clause which complies with

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Rule 30 of the Local Rules of Civil Procedure.

FN1. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the United States Supreme Court held that the "learned professions," including medicine and law, are not exempt from antitrust laws under the Sherman Act. Id. at 787. Since the Goldfard decision, antitrust suits based upon the denial or termination of hospital staff privileges have proliferated.

FN2. In paragraph 19 of the complaint, plaintiffs allege how defendants' activities have had a substantial effect on interstate commerce. However, in any case involving the denial of hospital staff privileges, "the only relevant jurisdictional inquiry involves a determination of whether the defendant hospital's denial of staff privileges to the plaintiff physician substantially and directly affects the plaintiff's activities in interstate commerce." *Pontius v. Children's Hosp.*, 552 F.Supp. 1352, 1361 (W.D.Pa. 1982) (quoting *Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 536 F.Supp. 1065, 1076 (E.D.Pa. 1982) (emphasis in original)).

FN3. In paragraph 19 of the complaint, plaintiffs further define "the Allentown area" as "the Lehigh Valley, Pennsylvania and West Central New Jersey area."

FN4. Defendants also request this court to strike plaintiffs' request for punitive damages. Because I have required plaintiffs to specify in their amended complaint the claims under which they are seeking punitive damages, I shall deny defendants' request.

CHAPTER 117—ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

Sec.
11101. Findings

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(c) Memorandum of understanding with drug enforcement administration.

LAW REVIEW COMMENTARIES

Quality health care and physician regulation—Recent developments. W. Eugene Basanta, 77 Ill.B.J. 214 (1988)

§ 11101. Findings

The Congress finds the following:

(1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

(2) There is a national need to restrict the ability of incompetent

physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

(Pub. L. 99—660, Title IV, § 402, Nov. 14, 1986, 100 Stat. 3784.)

References in Text

Federal antitrust law, referred to in par. (4), probably means the antitrust laws as defined in section 12 of Title 15, Commerce and Trade.

Short Title

Section 401 of Pub.L. 99—660 provided that: "This title [enacting this chapter] may be cited as the 'Health Care Quality Improvement Act of 1986'."

Legislative History

For legislative history and purpose of Pub.L. 99—660, see 1986 U.S. Code Cong. and Adm. News, p. 6287.

LAW REVIEW COMMENTARIES

Federal organ transplantation policy: A time for reassessment? James F. Blumstein, 22 U.C.Davis L.Rev. 451 (1989).

Health Care Quality Improvement Act of 1986 and its impact on hospital law. Mark A. Colantonio, 91 W.Va.L.Rev. 91 (1988—1989).

LIBRARY REFERENCES

Physicians and Surgeons 17.5.

C.J.S. Physicians, Surgeons, and Other Health Care Providers § 97 et seq.

SUBCHAPTER I—PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

§ 11111. Professional review

(a) In general

(1) Limitation on damages for professional review actions

If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section—

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action,

shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. and the Civil Rights Acts, 42 U.S.C. 1981 et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 4C of the Clayton Act, 15 U.S.C. § 15C [15 U.S.C.A. § 15c], where such an action is otherwise authorized.

(2) Protection for those providing information to professional review bodies

Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

(b) Exception

If the Secretary has reason to believe that a health care entity has failed to report information accordance with section 11133(a) of this title, the Secretary shall conduct an investigation. If, after providing notice of noncompliance, an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 11133(a) of this title, the Secretary shall publish the name of the entity in the Federal Register. The protections of subsection (a)(1) of this section shall not apply to an entity the name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 3-year period beginning 30 days after the date of publication of the name.

(c) Treatment under State laws

(1) Professional review actions taken on or after October 14, 1989

Except as provided in paragraph (2), subsection (a) of this section shall apply to State laws in a State only for professional review actions commenced on or after October 14, 1989.

(2) Exceptions

(A) State early opt-in

Subsection (a) of this section shall apply to State laws in a State for actions commenced before October 14, 1989, if the State by legislation elects such treatment.

(B) Effective date of election

An election under State law is not effective, for purposes of, [1] for actions commenced before the effective date of the State law, which may not be earlier than the date of the enactment of that law.

(Pub.L. 99—660, Title IV, § 411, Nov. 14, 1986, 100 Stat. 3784; Pub.L. 100—177, Title IV, § 402(c), as added Pub.L. 101—239, Title VI, § 6103(e)(6)(A) Dec. 19, 1989, 103 Stat. 2208.)

(W.D.Pa. 1983).

1.So in original.

HISTORICAL AND STATUTORY NOTES

References in Text

The Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., referred to in subsec. (a)(1) probably means Pub.L. 88—352, Title VII, July 2, 1964, 78 Stat. 253, which is classified generally to subchapter VI (section 2000e et seq.) of chapter 21 of this title.

The Civil Rights Acts, 42 U.S.C. 1981, et seq., referred to in subsec. (a)(1), probably means the provisions contained in chapter 21 (section 1981 et seq.) of this title.

1989 Amendment

Subsec. (c)(2)(B), (C). Pub.L. 101—239, § 6003(e)(6)(A), redesignated former subpar. (C) as (B) and, in subpar. (B) as so redesignated, struck out "subparagraphs (A) and (B)" following "for purposes of". Former subpar. (B), which authorized States to opt out for actions commenced on or after Oct. 14, 1989, was struck out.

Effective Date of 1987 Amendment

Amendment to subsec. (c)(2) of this section by section 402(c) of Pub.L. 100—177 effective Nov. 14, 1986, see section 402(d) of Pub.L. 100—177, as amended, set out as a note under section 11137 of this title.

Effective Date

Section 416 of Pub.L. 99—660 provided that: "This part [subchapter] shall apply to professional review actions commenced on or after the date of the enactment of this Act [Nov. 14, 1986].

Transitional and Savings Provisions for Pub.L. 101—239

For provisions transferring personnel of the Department of Health and Human Services employed on Dec. 19, 1989 in connection with the functions vested in the Administrator for Health Care Policy and Research pursuant to section 6103 of Pub.L. 101—239, and assets, liabilities, etc. of such Department arising from or employed, held, used, or available on such date, or to be made available after such date, in connection with such functions, to the Administrator for appropriate allocation, and provisions for continued effectiveness of actions, orders, rules, official documents, etc. of the Department of Health and Human Services that have been issued, made, granted or allowed to become effective in the performance of such functions, and that were effective

on Dec. 19, 1989, see section 6103(f) of Pub.L. 101—239, set out as a note under section 299 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99—660, see 1986 U.S. Code Cong. and Adm. News, p. 6287. See, also, Pub.L. 101—239, 1989 U.S. Code Cong. and Adm. News, p. 1906.

LAW REVIEW COMMENTARIES

Antitrust and hospital peer review. James F. Blumstein and Frank A. Sloan, 51 L. & Contemp. Prob. 7 (1988).

Federal organ transplantation policy: A time for reassessment? James F. Blumstein, 22 U.C.Davis L.Rev. 451 (1989)

LIBRARY REFERENCES

Physicians and Surgeons 17.5.

C.J.S. Physicians, Surgeons, and Other Health-Care Providers § 97 et seq.

NOTES OF DECISIONS

Antitrust liability 1
Construction ½
Exhaustion of administrative remedies 3
Qualified immunity 2

½. Construction

Health Care Quality Improvement Act of 1986 did not apply, and could not be construed as limiting discovery through interrogatories of peer review information, in sex discrimination case, and even if the act did apply to civil rights actions, it would not apply where physician was not afforded all the protection set forth in the Act. LeMasters v. Christ Hosp., S.D.Ohio 1991, 791 F.Supp. 188.

1. Antitrust liability

Peer review of cardiologist resulting in revocation of his staff privileges as physician was in furtherance of quality health care, after reasonable effort to obtain facts, and in compliance with requirements of the

Health Care Quality Improvement Act, so that physicians on board and hospital were immune from federal antitrust liability; review committee found that cardiologist's treatment of five cases at prior hospital was below acceptable quality of health care, and, although cardiologist was not allowed to introduce evidence of performance of other physicians, he participated investigation into professional performance, and was represented by attorney. *Smith v. Ricks*, N.D.Cal. 1992, 798 F.Supp. 605.

Hospital supervisory committee's professional review action of suspending physician after physician refused to comply with monitoring restraints was objectively reasonable and warranted under Hospital Care Quality Improvement Act (HCQIA); thus, hospital and members of committee were immune from antitrust liability under HCQIA in their capacity as professional review body with regard to suspension of physician. *Fobbs v. Holy Cross Health System Corp.*, E.D.Cal. 1992, 789 F.Supp. 1054.

Health Care Quality Improvement Act immunized hospital and individual physicians from federal antitrust liability for their conduct in connection with suspension of and subsequent conditional reinstatement of neurosurgeon's staff privileges; actions were in interest of furthering quality health care and were taken after extensive evaluations, monitoring of neurosurgeon's work, and, as to reinstatement, after lengthy hearings at which neurosurgeon was permitted to adduce evidence. *Austin v. McNamara*, C.D.Cal. 1990, 731 F.Supp. 934.

2. Qualified immunity

Health Care Quality Improvement Act (HCQIA) provides immunity to health care entity's professional review body for discrete professional review actions/decisions which meet particular standards, i.e., reasonable belief that action furthered quality health care, fact gathering, notice and hearing, and resulting reasonable belief that action taken was warranted; HCQIA does not require that professional review body's entire course of investigative conduct meet particular standards in order for it be immune from liability for its ultimate decision. *Fobbs v. Holy Cross Health System Corp.*, E.D.Cal. 1992, 789 F.Supp. 1054.

Health Care Quality Improvement Act, which gives qualified immunity from suit to officials who conduct peer reviews meeting certain standards specified by the Act, did not apply to physician's motion to compel production of peer review documents from hospitals since peer review activities at issue predated effective date of Act. *Teasdale v. Marin General Hosp.*, N.D.Cal. 1991, 138 F.R.D. 691.

3. Exhaustion of administrative remedies

Exhaustion doctrine did not require physicians whose hospital surgery privileges were revoked to pursue complaint before the New York Public Health Council before bringing federal lawsuit alleging antitrust claim; legislative history of the Sherman Act contained no indication that Congress intended state administrative agencies to pass on whether plaintiff had asserted valid federal antitrust claim before consideration of antitrust claim by federal court. *Johnson v. Nyack Hosp.*, C.A.2 (N.Y.) 1992, 964 F.2d 116.

§ 11112. Standards for professional review actions

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken—

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating—

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) Reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating—

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B)—

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)—

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right—

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witness,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved

has the right—

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

(c) Adequate procedures in investigations or health emergencies

For purposes of section 11111(a) of this title, nothing in this section shall be construed as—

(1) requiring the procedures referred to in subsection (a)(3) of this section—

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

(Pub.L. 99—660, Title IV, § 412, Nov. 14, 1986, 100 Stat. 3785.)

HISTORICAL AND STATUTORY NOTES

Effective Date

Section to apply to professional review actions commenced on or after Nov. 14, 1986, see section 416 of Pub.L. 99—660, set out as a note under section 12011 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99—660, see 1986 U.S. Code Cong. and Adm. News, p. 6287.

LAW REVIEW COMMENTARIES

Physician staff privilege cases: Antitrust liability and the Health Care Quality Improvement Act. Note, 29 W & M L.Rev. 625 (1988).

LIBRARY REFERENCES

Physicians and Surgeons 18.1.
C.J.S. Physicians, Surgeons, and Other Health-Care Providers § 97 et seq.

NOTES OF DECISIONS

Particular cases 2
Private right of action 1

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1. Private right of action

Health Care Quality Improvement Act did not provide private cause of action to physician claiming denial of due process by reason of hospital's suspension of his participation in psychiatric residency program; Act's legislative history indicated intent to provide solely for immunity on part of professional review bodies. *Goldsmith v. Harding Hosp., Inc.*, S.D.Ohio 1991, 762 F.Supp. 187.

2. Particular Cases

Hospital supervisory committee maintained objectively reasonable belief that their decision to retain monitoring restrictions with respect to physician was warranted as required by Hospital Care Quality Improvement Act, where after imposing monitoring restrictions, committee continued to investigate, gave physician adequate opportunity for hearing, buy physician declined to participate without good cause, and committee filed appropriate records with Medical Board of California regarding imposition of monitoring system. *Fobbs v. Holy Cross Health System Corp.*, E.D.Cal. 1992, 789 F.Supp. 1054.

§ 11113. Payment of reasonable attorneys' fees and costs in defense of suit.

In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title

and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such a claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith. For the purposes of this section, a defendant shall not be considered to have substantially prevailed when the plaintiff obtains an award for damages or permanent injunctive or declaratory relief.

(Pub.L. 99—660, Title IV, § 413, Nov. 14, 1986, 100 Stat. 3787.)

HISTORICAL AND STATUTORY NOTES

Effective Date

Section to apply to professional review actions commenced on or after Nov. 14, 1986, see section 416 of Pub.L. 99–660, set out as a note under section 12011 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–660, see 1986 U.S. Code Cong. and Adm. News, p. 6287.

LIBRARY REFERENCES

Physicians and Surgeons 18.110.
C.J.S. Physcians, Surgeons, and Other Health-Care Providers § 97 et seq.

NOTES OF DECISIONS

Frivolous complaint 1

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1. Frivolous complaint

Hospital and physicians who had obtained summary judgment in their favor against physician challenging withdrawal of his surgery privileges were not entitled to statutory attorney fees; even though complaint had been dismissed for failure to exhaust administrative remedies, it was not frivolous or entirely without foundation. *Johnson v. Nyack Hosp.*, S.D.N.Y. 1991, 773 F.Supp. 625.

§ 11114. Guidelines of the Secretary

The Secretary may establish, after notice and opportunity for comment, such voluntary guidelines as may assist the professional review bodies in meeting the standards described in section 11112(a) of this title.

(Pub.L. 99–660, Title IV, § 414, Nov. 14, 1986, 100 Stat. 3787)

HISTORICAL AND STATUTORY NOTES

Effective Date

Section to apply professional review actions commenced on or after Nov. 14, 1986, see section 416 of Pub.L. 99–660, set out as a note under section 12011 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–660, see 1986 U.S. Code Cong. and Adm. News, p. 6287.

§ 11115. Construction

(a) In general

Except as specifically provided in this subchapter, nothing in this subchapter shall be constured as changing the liabilities or immunities under law or as preempting or overriding any State law which provides incentives, immunities, or protection for those engaged in a professional review action that is in addition to or greater than that provided by this part.

(b) Scope of clinical privileges

Nothing in this subchapter shall be construed as requiring health care entities to provide clinical privileges to any or all classes or types of physicians or other licensed health care practitioners.

(c) Treatment of nurses and other practitioners

Nothing in this subchapter shall be construed as affecting, or modifying any provision of Federal or State law, with respect to activities of professional review bodies regarding nurses, other licensed health care practitioners, or other health care professionals who are not physicians.

(d) Treatment of patient malpractice claims

Nothing in this chapter shall be construed as affecting in any manner the rights and remedies afforded patients under any provision of Federal or State law to seek redress for any harm or injury suffered as a result of negligent treatment or care by any physician, health care practitioner, or health care entity, or as limiting any defenses or immunities available to any physician, health care practitioner, or health care entity.

(Pub.L. 99–660, Title IV, § 415, Nov. 14, 1986, 100 Stat. 3787; Pub.L. 100–177, Title IV, § 402(c), as added Pub.L. 101–239, Title VI, § (e)(6)(A), Dec. 19, 1989, 103 Stat. 2208.)

HISTORICAL AND STATUTORY NOTES

Effective Date of 1987 Amendment

Amendment to subsec. (a) of this section by section 402(c) of Pub.L. 100–177 effective Nov. 14, 1986, see section 402(d) of Pub.L. 100–177, as amended, set out as a note under section 11137 of this title.

Effective Date

Section to apply to professional review actions commenced on or after Nov. 14, 1986, see section 416 of Pub.L. 99–660, set out as a note under section 11111 of this title.

Transitional and Savings Provisions for Pub.L. 101–239

For provisions transferring personnel of the Department of Health and Human Services employed on Dec. 19, 1989 in connection with the functions vested in the Administrator for Health Care Policy and Research pursuant to section 6103 of Pub.L. 101–239, and assets, liabilities, etc. of such Department arising from or employed, held, used, or available on such date, or to be made available after such date, in connection with such functions, to the Administrator for appropriate allocation, and provisions for continued effectiveness of actions, orders, rules, official documents, etc. of the Department of Health and Human Services that have been issued, made, granted or allowed to become effective in the performance of such functions, and that were effective on Dec. 19, 1989, see section 6103(f) of Pub.L. 101–239, set out as a note under section 299 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–660, see 1986 U.S. Code Cong. and Adm. News, p. 6287. See, also, Pub.L. 101–239, 1989 U.S. Code Cong. and Adm. News, p. 1906.

LAW REVIEW COMMENTARIES

Legislation on medical malpractice: Further developments and preliminary report card. Randall R. Bovbjerg, 22 U.C.Davis L.Rev. 499 (1989).

SUBCHAPTER II—REPORTING OF INFORMATION

§ 11131. Requiring reports on medical malpractice payments

(a) In general

Each entity (including an insurance company) which makes payment under a policy of insurance, self-insurance, or otherwise in settlement (or partial settlement) of, or in satisfaction of a judgment in, a medical malpractice action or claim shall report, in accordance with section 11134 of this title, information respecting the payment and circumstances thereof.

(b) Information to be reported

The information to be reported under subsection (a) of this section includes—

(1) the name of any physician or licensed health care practitioner for whose benefit the payment is made,

(2) the amount of the payment,

(3) the name (if known) of any hospital with which the physician or practitoner is affiliated or associated,

(4) a description of the acts or omissions and injuries or illnesses upon which the action or claim was based, and

(5) such other information as the Secretary determines is required for appropriate interpretation of information reported under this section.

(c) Sanctions for failure to report

Any entity that fails to report information on a payment required to be reported under this section shall be subject to a civil money penalty of not more than $10,000 for each such payment involved. Such penalty shall be imposed and collected in the same manner as civil money penalties under subsection (a) of section 1320a-7a of this title are imposed and collected under that section.

(d) Report on treatment of small payments

The Secretary shall study and report to Congress, not later than two

years after November 14, 1986, on whether information respecting small payments should continue to be required to be reported under subsection (a) of this section and whether information respecting all claims made concerning a medical malpractice action should be required to be reported under such subsection.
(Pub.L. 99–660, Title IV, § 421, Nov. 14, 1986, 100 Stats. 3788.)

HISTORICAL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 99—660, see 1986 U.S. Code Cong. and Adm. News, p. 6287.

LIBRARY REFERENCES

Physicians and Surgeons 16.
C.J.S. Physicians, Surgeons, and Other Health-Care Providers § 70 et seq.

§ 11132. Reporting of sanctions taken by boards of medical examiners

(a) In general

(1) Actions subject to reporting

Each Board of Medical Examiners—

(A) which revokes or suspends (or otherwise restricts) a physician's license or censures, reprimands, or places on probation a physician, for reasons relating to the physician's professions competence or professional conduct, or

(B) to which a physician's license is surrendered, shall report, in accordance with section 11134 of this title, the information described in paragraph (2).

(2) Information to be reported

The information to be reported under paragraph (1) is—

(A) the name of the physician involved,

(B) a description of the acts or omissions or other reasons (if known) for the revocation, suspension, or surrender of license, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) Failure to report

If, after notice of noncompliance and providing opportunity to correct noncompliance, the Secretary determines that a Board of Medical Examiners has failed to report information in accordance with subsection (a) of this section, the Secretary shall designate another qualified entity for the reporting of information under section 11133 of this title.

(Pub.L. 99—660, Title IV, § 422, Nov. 14, 1986, 100 Stat. 3789.)

HISTORICAL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 99—660, see 1986 U.S. Code Cong. and Adm. News, p. 6287.

LIBRARY REFERENCES

Physicians and Surgeons 9, 17.5.
C.J.S. Physicians, Surgeons, and Other Health-Care Providers §§ 9 et seq., 97 et seq.

§ 11133. Reporting of certain professional review actions taken by health care entities.

(a) Reporting by health care entities

(1) On physicians

Each health care entity which—

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;

(B) accepts the surrender of clinical privileges of a physician—

(i) while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or

(ii) in return for not conducting such an investigation or proceeding; or

(C) in the case of such an entity which is a professional society, takes a professional review action which adversely affects the membership of a physician in the society,

shall report to the Board of Medical Examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3).

(2) Permissive reporting on other licensed health care practitioners

A health care entity may report to the Board of Medical Examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3) in the case of a licensed health care practitioner who is not a physician, if the entity would be required to report such information under paragraph (1) with respect to the practitioner if the practitioner were a physician.

(3) Information to be reported

The information to be reported under this subsection is—

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) Reporting by Board of Medical Examiners

Each Board of Medical Examiners shall report, in accordance with section 11134 of this title, the information reported to it under subsection (a) of this section and known instances of a health care entity's failure to report information under subsection (a)(1) of this section.

(c) Sanctions

(1) Health care entities

A health care entity that fails substantially to meet the requirement of subsection (a)(1) of this section shall lose the protections of section 11111(a)(1) of this title if the Secretary publishes the name of the entity under section 11111(b) of this title.

(2) Board of Medical Examiners

If, after notice of noncompliance and providing an opportunity to correct noncompliance, the Secretary determines that a Board of Medical Examiners has failed to report information in accordance with subsection (b) of this section, the Secretary shall designate another qualified entity for the reporting of information under subsection (b) of this section.

(d) References to Board of Medical Examiners

Any reference in this subchapter to a Board of Medical Examiners includes, in the case of a Board in a State that fails to meet the reporting requirements of section 11132(a) of this title or subsection (b) of this section, a reference to such other qualified entity as the Secretary designates.

(Pub.L. 99—660, Title IV, § 423, Nov. 14, 1986, 100 Stat. 3789.)

HISTORICAL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 99—660, see 1986 U.S. Code Cong. and Adm. News, p. 6287.

LIBRARY REFERENCES

Physicians and Surgeons 9, 17.5.
C.J.S. Physicians, Surgeons, and Other Health-Care Providers §§ 9 et seq., 97 et seq.

§ 11134. Form of reporting

(a) Timing and form

The information required to be reported under sections 11131, 1132(a), and 11133 of this title shall be reported regularly (but not less often than monthly) and in such form and manner as the Secretary prescribes. Such information shall first be required to be reported on a date (not later than one year after November 14, 1986) specified by the Secretary.

(b) To whom reported

The information required to be reported under sections 11131, 11132(a), and 11133(b) of this title shall be reported to the Secretary, or, in the Secretary's discretion, to an appropriate private or public agency which has made suitable arrangements with the Secretary with respect to receipt, storage, protection of confidentiality, and dissemination of the information under this subchapter.

(c) Reporting to State licensing boards

(1) Malpractice payments

Information required to be reported under section 11131 of this title shall also be reported to the appropriate State licensing board (or

boards) in the State in which the medical malpractice claim arose.

(2) Reporting to other licensing boards

Information required to be reported under section 11132(b) of this title shall also be reported to the appropriate State licensing board in the State in which the health care entity is located if it is not otherwise reported to such board under subsection (b) of this section.

(Pub.L. 99—660, Title IV, § 424, Nov. 14, 1986, 100 Stat. 3790.)

HISTORICAL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 99—660, see 1986 U.S. Code Cong. and Adm. News, p. 6287.

§ 11135. Duty of hospitals to obtain information

(a) In general

It is the duty of each hospital to request from the Secretary (or the agency designated under section 11134(b) of this title), on and after the date information is first required to be reported under section 11134(a) of this title—

(1) at the time a physician or licensed health care practitioner applies to be on the medical staff (courtesy or otherwise) of, or for clinical privileges at, the hospital, information reported under this subchapter concerning the physician or practitioner, and

(2) once every 2 years information reported under this subchapter concerning any physician or such practitioner who is on the medical staff (courtesy or otherwise) of, or has been granted clinical privileges at, the hospital.

A hospital may request such information at other times.

(b) Failure to obtain information

With respect to a medical malpractice action, a hospital which does not request information respecting a physician or practitioner as required under subsection (a) of this section is presumed to have knowledge of any information reported under this subchapter to the Secretary with respect to the physician or practitioner.

(c) Reliance on information provided

Each hospital may rely upon information provided to the hospital under this chapter and shall not be held liable for such reliance in the absence of the hospital's knowledge that the information provided was false.

(Pub.L. 99—660, Title IV, § 425, Nov. 14, 1986, 100 Stat 3790.)

HISTORICAL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 99—660, see 1986 U.S. Code Cong. and Adm. News, p. 6287.

LIBRARY REFERENCES

Hospitals 6.
C.J.S. Hospital § 5 et seq.

§ 11136. Disclosure and correction of information

With respect to the information reported to the Secretary (or the agency designated under section 11134(b) of this title) under this subchapter respecting a physician or other licensed health care practitioner, the Secretary shall, by regulation, provide for—

(1) disclosure of the information, upon request, to the physician or practitioner and

(2) procedures in the case of disputed accuracy of the information.

(Pub.L. 99—660, Title IV, § 426, Nov. 14, 1986, 100 Stat. 3791.)

HISTORICAL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 99—660, see 1986 U.S. Code Cong. and Adm. News, p. 6287.

§ 11137. Miscellaneous provisions

(a) Providing licensing boards and other health care entities with access to information

The Secretary (or the agency designated under section 11134(b) of this title shall, upon request, provide information reported under this subchapter with respect to a physician or other licensed health care practitioner to State licensing boards, to hospitals, and to other health care entities (including health maintenance organizations) that have entered (or may be entering) into an employment or affiliation relationship with the physician or practitioner or to which the physician or practitioner has applied for clinical privileges or appointment to the medical staff.

(b) Confidentiality of information

(1) In general

Information reported under this subchapter is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity, as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a) of this section. Nothing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure. Information reported under this part that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential. The Secretary (or the agency designated under section 11134(b) of this title), on application by any person, shall prepare such information in such form and shall disclose such information in such form.

(2) Penalty for violations

Any person who violates paragraph (1) shall be subject to a civil money penalty of not more than $10,000 for each such violation involved. Such penalty shall be imposed and collected in the same manner as civil money penalties under subsection (a) of section 1320a-7a of this title are imposed and collected under that section.

(3) Use of information

Subject to paragraph (1), information provided under section 11135

of this title and subsection (a) of this section is intended to be used soley with respect to activities in the furtherance of the quality of health care.

(4) Fees

The Secretary may establish or approve reasonable fees for the disclosure of information under this section or section 11136 of this title. The amount of such a fee may not exceed the costs of processing the requests for disclosure and of providing such information. Such fees shall be available to the Secretary (or, in the Secretary's discretion, to the agency designated under section 11134(b) of this title) to cover such costs.

(c) Relief from liability for reporting

No person or entity (including the agency designated under section 11134(b) of this title) shall be held liable in any civil action with respect to any report made under this subchapter (including information provided under subsection (a) of this section[1] without knowledge of the falsity of the information contained in the report.

(d) Interpretation of information

In interpreting information reported under this subchapter, a payment in settlement of a medical malpractice action or claim shall not be construed as creating a presumption that medical malpractice has occurred.

(Pub.L. 99—660, Title IV, § 427, Nov. 14, 1986, 100 Stat. 3791; Pub.L.100—177, Title IV, § 402(a), (b), Dec. 1, 1987, 101 Stat. 1007.)

HISTORICAL AND STATUTORY NOTES

1987 Amendment

Subsec. (b)(1) Pub.L. 100—177, § 402(a)(1)(A), substituted "as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary)" for "with respect to medical malpractice actions".

Pub.L. 100—177, § 402(a)(1)(B), added provisions that information reported under this part that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential, and that the Secretary (or the agency designated under section 11134(b) of this

title), on application by any person, shall prepare such information in such form and shall disclose such information in such form.

Subsec. (b)(4). Pub.L. 100—177, § 402(b), added par. (4).

Subsec. (c). Pub.L. 100—177, § 402(a)(2), substituted "No person or entity (including the agency designated under section 11134(b) of this title) shall be held liable in any civil action with respect to any report made under this subchapter (including information provided under subsection (a) of this section without knowledge of the falsity of the information contained in the report" for "No person or entity shall be held liable in any civil action with respect to any report made under this subchapter without knowledge of the falsity of the information contained in the report".

Effective Date of 1987 Amendment

Section 402(d), formerly 402(c) of Pub.L. 100—177, as amended and renumbered Pub.L. 101—239, Title VI, § 6103(e)(6), Dec. 19, 1989, 103 Stat. 2208, provided that:

"(1) **In general.**—The amendments made by subsections (a) [amending subsecs. (b)(1) and (c) of this section] and (c) [amending sections 11111(c)(2) and 11115(a) of this title] shall become effective on November 14, 1986.

"(2) **Fees.**—The amendment made by subsection (b)[enacting subsec. (b)(4) of this section] shall become effective on the date of enactment of this Act [Dec. 1, 1987]."

Legislative History

For legislative history and purpose of Pub.L. 99—660, see 1986 U.S. Code Cong. and Adm. News, p 6287. See, also, Pub.L. 100—177, see 1987 U.S. Code Cong. and Adm. News, p. 960.

LAW REVIEW COMMENTARIES

Legislation on medical malpractice: Further developments and preliminary report card. Randall R. Bovbjerg, 22 U.C.Davis L. Rev. 499 (1989).

NOTES OF DECISIONS

Antitrust actions 1
Confidentiality of information 2

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1. Antitrust actions

Statutory peer review privilege contained in Health Quality Improvement Act does not cover federal antitrust suits; privilege is qualified rather than absolute. *Wei v. Bodner*, D.N.J. 1989, 127 F.R.D. 91.

2. Confidentiality of information

Health Care Quality Improvement Act did not apply in determining whether Government was entitled to physician's records at hospital in connection with investigation of possible civil violations surrounding Medicaid statements. *St. Luke's Regional Medical Center, Inc. v. U.S.*, N.D.Iowa 1989, 717 F.Supp. 665.

Federal statute controlling release of information regarding physicians, when provided upon request for appropriate list of authorities by Secretary of Health and Human Services, when the information came into Secretary's hands by virtue of the statutory scheme had no application to documents in hospital's peer review file. *Manthe v. VanBolden*, N.D.Tex. 1991, 133 F.D.R. 497.

SUBCHAPTER III—DEFINITIONS AND REPORTS

§ 11151. Definitions

In this title:

(1) The term "adversely affecting" includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or membership in a health care entity.

(2) The term "Board of Medical Examiners" includes a body comparable to such a Board (as determined by the State) with responsibility for the licensing of physicians and also includes a subdivision of such a Board or body.

(3) The term "clinical privileges" includes privileges, membership on the medical staff, and the other circumstances pertaining to the furnishing of medical care under which a physician or other licensed health care practitioner is permitted to furnish such care by a health care entity.

(4)(A) The term "health care entity" means—

(i) a hospital that is licensed to provide health care services by the State in which it is located.

(ii) an entity (including a health maintenance organization or group medical practice) that provides health care services and that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary), and

(iii) subject to subparagraph (B), a professional society (or committee thereof) of physicians or other licensed health care practitioners that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary).

(B) The term "health care entity" does not include a professional society (or committee thereof) if, within the previous 5 years, the society has been found by the Federal Trade Commission or any court to have engaged in any anti-competitive practice which had the effect of restricting the practice of licensed health care practitioners.

(5) The term "hospital" means an entity described in paragraphs (1) and (7) of section 1395x(e) of this title.

(6) The terms "licensed health care practitioner" and "practitioner" mean, with respect to a State, an individual (other than a physician) who is licensed or otherwise authorized by the State to provide health care services.

(7) The term "medical malpractice action or claim" means a written claim or demand for payment based on a health care provider's furnishing (or failure to furnish) health care services, and includes the filing of a cause of action, based on the law of tort, brought in any court of any State or the United States seeking monetary damages.

(8) The term "physician" means a doctor of medicine or osteopathy or a doctor of dental surgery or medical dentistry legally authorized to practice medicine and surgery or dentistry by a State (or any individual who, without authority holds himself or herself out to be so authorized).

(9) The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence

and also includes professional review activities relating to a professional review action. In this chapter, an action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on—

(A) the physician's association, or lack of association, with a professional society or association,

(B) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business,

(C) the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis,

(D) a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional, or

(E) any other matter that does not relate to the competence or professional conduct of a physician.

(10) The term "professional review activity" means an activity of a health care entity with respect to an individual physician—

(A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,

(B) to determine the scope or conditions of such privileges or membership or,

(C) to change or modify such privileges or membership.

(11) The term "professional review body" means a health care entity and the governing body or any committee of health care entity which conducts professional review activity, and includes a committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

(12) The term "Secretary" means the Secretary of Health and Human Services.

(13) The term "State" means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

(14) The term "State licensing board" means, with respect to a physician or health care provider in a State, the agency of the State

which is primarily responsible for the licensing of the physician or provider to furnish health care services.

(Pub.L. 99—660, Title IV, § 431, Nov. 14, 1986, 100 Stat. 3792.)

HISTORICAL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 99—660, see 1986 U.S. Code Cong. and Adm. News, p. 6287.

NOTES OF DECISIONS

Professional review activity 1

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1. Professional review activity

"Professional review activity" within meaning of Health Care Quality Improvement Act (HCQIA), means investigative process during and/or upon which professional review action, i.e., decision, is made; professional review action/decision is borne of investigative process and may entail secondary level of additional, more narrowed investigation as needed based on information discovered during initial investigation. *Fobbs v. Holly Cross Health System Corp.*, E.D.Cal. 1992, 789 F.Supp. 1054.

§ 11152. Reports and memoranda of understanding

(a) Annual reports to Congress

The Secretary shall report to Congress, annually during the three years after November 14, 1986, on the implementation of this chapter.

(b) Memoranda of understanding

The Secretary of Health and Human Services shall seek to enter into memoranda of understanding with the Secretary of Defense and the Administrator of Veterans' Affairs to apply the provisions of subchapter II of this chapter to hospitals and other facilities and health care providers under the jurisdiction of the Secretary or Administrator, respectively. The Secretary shall report to Congress, not later than two years

after November 14, 1986, on any such memoranda and on the cooperation among such officials in establishing such memoranda.

(c) Memorandum of understanding with drug enforcement administration

The Secretary of Health and Human Services shall seek to enter into a memorandum of understanding with the Administrator of Drug Enforcement relating to providing for the reporting by the Administrator to the Secretary of information respecting physicians and other practitioners whose registration to dispense controlled substances has been suspended or revoked under section 824 of Title 21. The Secretary shall report to Congress, not later than two years after November 14, 1986, on any such memorandum and on the cooperation between the Secretary and the Administrator in establishing such a memorandum.

(Pub.L. 99—660, Title IV, § 432, Nov. 14, 1986, 100 Stat. 3794)

HISTORICAL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 99—660, see 1986 U.S. Code Cong. and Adm. News, p. 6287.

CHAPTER 118—ALZHEIMER'S DISEASE AND RELATED DEMENTIAS SERVICES RESEARCH

SUBCHAPTER I—GENERAL PROVISIONS
Sec.
11201. Congressional statement of findings.

SUBCHAPTER II—COUNCIL ON ALZHEIMER'S DISEASE
11211. Establishment.
11212. Functions; reports to Congress

SUBCHAPTER III—ADVISORY PANEL ON ALZHEIMER'S DISEASE
11221. Establishment of Panel.
(a) Composition; nonvoting ex officio members.
(b) Appointment of members.